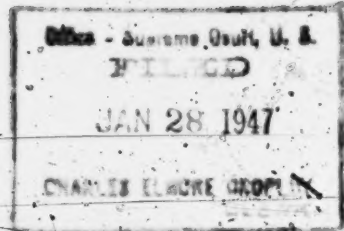


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No 958 37

Supreme Court of the United States.

OCTOBER TERM, 1946.

MARTIN V. B. COE, PETITIONER,

v.

KATHARINE C. COE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
PROBATE COURT FOR THE COUNTY OF
WORCESTER, MASSACHUSETTS.

ARTHUR V. GETCHELL,

Attorney for Petitioner.

Of counsel:

GEORGE H. MASON,

SAMUEL PERMAN.

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KATHARINE C. COE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari be issued to review the final judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below.

The first opinion of the Court below in this case is reported at 316 Mass. 423, and appears in the record at page 612. The final decision is contained in the record at page 616. It is reported in 1946 Mass. Advance Sheets, 1127.

Jurisdiction.

The opinion and rescript of the Court below was entered on October 30, 1946. This petition is presented within three months from the entry of the judgment below. Jurisdiction.

is invoked under section 237 (b) of the Judicial Code, 28 U.S.C. section 344 (b). The questions presented by this petition were raised by petitioner's motion to dismiss (R. 14), by motion for entry of finding sustaining plea in bar (R. 39), by motion to strike evidence (R. 35), by objection (R. 112), and by other objections taken throughout the trial of the case.

Questions Presented.

1. (a) Did the Court below err in holding that the evidence supported the finding by the Trial Court that petitioner was not domiciled in the State in which respondent obtained her divorce, and in disregarding a contrary finding based on the pleadings and testimony of both parties made by the Court granting the divorce?
- (b) Did the Court below disregard the proper criteria and standards of proof with respect to the question of domicile?
2. May the question of the jurisdiction of the Court granting the divorce be relitigated under the Full Faith and Credit Clause by the party obtaining it, in view of the fact that both husband and wife were personally subject to the jurisdiction of the Court, raised issues on the merits, and testified in the proceedings?
3. Apart from the validity of the divorce, are the incidents of the marital relationship, such as support and property rights, subject to relitigation, under article IV, section 1, of the Constitution, when the Court deciding such issues had jurisdiction over the persons of both parties?
4. Does Massachusetts General Laws (Ter. Ed.) chapter 208, section 39, as interpreted and applied by the Court below, deprive petitioner of rights guaranteed him by the Full Faith and Credit Clause?

Statute Involved.

"A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." (G.L. (Ter. Ed.) c. 208, sec. 39.)

Statement.

Respondent, the former wife of petitioner, on May 25, 1943, filed a petition for contempt in Probate Court for the County of Worcester, Massachusetts, alleging that she was the wife of petitioner and that he be adjudged in contempt for failure to comply with an award of support made in that Court on March 25, 1942 (R. 1). For a defense, petitioner set up as a bar a divorce obtained by respondent in Nevada in September, 1942 (R. 2). Respondent then filed a petition for modification of the support award, to which petitioner filed an answer setting up the Nevada decree and the property settlement contained thereon (R. 5, 36). Petitioner also filed a petition for revocation of the support award based upon the Nevada judgment (R. 7), and a plea in bar relying thereon (R. 18).

The trial judge dismissed the petition for contempt and the petition for revocation was sustained upon the basis of an exemplified extended record of the Nevada proceedings (R. 580-601). The parties were adjudged no longer man and wife. Respondent appealed and these decrees were reversed and the case remanded, on the ground that

4.

the Full Faith and Credit Clause, as applied to the present facts, did not preclude inquiry into the jurisdiction of the Nevada Court to grant the divorce; the Court further held that the fact that respondent was the recipient of the divorce did not estop her from showing that G.L. (Ter. Ed.) c, 208, sec. 39, which the Court held valid, had been violated. *Coe v. Coe*, 316 Mass. 423.

Upon remand of the cause, an extensive hearing was held with respect to the jurisdiction of the Nevada Court, the violation of the statute, as well as other matters.

The evidence shows that the parties were married in New York City in 1934, and until their separation in 1939 they resided in Worcester, Massachusetts. In 1940 petitioner leased an apartment in New York City, where he made his home (R. 234), taking occasional trips to inspect his Worcester properties (R. 481-482). Most of his business, which consisted of dealing in securities, was transacted in New York, where, in 1939, he formed a corporation to facilitate his business (R. 229-230).

In January, 1941, respondent filed a petition in the Probate Court for support, alleging desertion and cruelty, and on March 25, 1942, was awarded \$35 weekly for her support, which amount was sustained upon her appeal to the Supreme Judicial Court (313 Mass. 232).

On June 10, 1942, petitioner, having decided to move from New York City, arrived in Reno, Nevada (R. 114). He testified that he intended to make his home in that State for reasons of health (asthma) (R. 245), and to get away from respondent. He was attracted by the liberal tax laws of Nevada (R. 245). He also intended, while living in Nevada, to obtain a divorce, relying on a cause which occurred in New York after the March 25, 1942, decree in Massachusetts (R. 246-247).

Petitioner filed a complaint for divorce in the District Court for the First Judicial District of the State of Nevada

on July 27, 1942, alleging he was a bona-fide resident of Nevada and basing his claim for divorce upon cruelty and desertion (R. 599-601). Respondent was personally served with notice of the divorce proceeding in Worcester, Massachusetts (R. 430), and after consultation with local counsel, she went to Nevada for the purpose of contesting petitioner's action and to obtain a divorce herself (R. 431). To that end, she engaged Nevada counsel, recommended by the local Chamber of Commerce (R. 433). Respondent had not seen petitioner or been in touch with him from the time of the support proceedings in Massachusetts, in March, 1942, until the Nevada hearing on September 19, 1942, except through counsel for the purpose of the property settlement mentioned below (R. 429). Respondent did not know petitioner had gone to Reno until service of the citation was made upon her in Worcester (R. 429-430).

Respondent filed a demurrer to petitioner's complaint (R. 596). On September 18, 1942, she filed an answer, raising issues on the merits, admitting petitioner's allegations as to residence (R. 593-594), and a cross-complaint alleging cruelty. She further alleged that the parties had "entered into a written agreement fully and finally settling all property rights of every nature between them, and which said agreement she believes to be fair and reasonable" (R. 594). She prayed for a divorce on the ground of extreme cruelty and asked that the property settlement contract be ratified, approved, and adopted by the Nevada Court (R. 594). Under the terms of the property settlement, respondent was to receive \$7500 in cash immediately, and \$35 weekly for support, in consideration of which she released all claims against the estate and property of the petitioner, including all other claims for support. She was paid the \$7500 (R. 515).

The petitions for divorce were heard on September 19, 1942. Both parties were present in Court, and each was

represented by separate counsel. Petitioner testified that he had been present in Nevada from June 10, 1942, until July 27, 1942, and that with the exception of a few days he had continued to be physically present in Nevada up to the date of the divorce hearing (R. 584-585). He testified that when he came to Nevada he did so with the intention of making Nevada his home, and that intention was unchanged (R. 585). He further testified that he had opened a bank account in Reno; that he had a safety deposit box there; that he had registered his automobiles in Nevada, and taken out a driver's license (R. 585). His testimony as to residence was fully corroborated by witnesses. Petitioner made his home at a ranch near Reno (R. 584).

Respondent testified to the acts of cruelty and admitted having entered into a property settlement which respondent requested the Court to approve and adopt (R. 586-587). The Nevada Court found on the evidence that it had jurisdiction of the plaintiff and defendant and of the subject-matter (R. 588). The Court awarded a divorce to the respondent and ratified, approved, confirmed, and adopted the property settlement contract, ordering each of the parties to comply with its terms (R. 589).

Petitioner remarried the day respondent received her divorce and returned to New York with his wife for the purpose of vacating his apartment, the lease of which was shortly to expire (R. 253). He thereafter went to Worcester, Massachusetts, for the purpose of disposing of his real estate. He sold the house he had lived in in Worcester (R. 254) and rented the other. Petitioner then returned to Nevada with his wife in May, 1943, in order to purchase a home and other property there (R. 254, 255, 575). He was particularly interested in purchasing and operating the ranch at which he had lived previously, and entered into negotiations with a view to acquiring it (R. 255).

Shortly after his arrival in Reno, he learned that the contempt proceedings had been started against him in Massachusetts (R. 255) and he was advised by his Nevada counsel to return to Massachusetts and defend that action (R. 257, 575). Petitioner and his wife returned in August, 1943 (R. 334). His testimony was corroborated by the deposition of his Nevada counsel, presently Attorney General of that State. The validity of the divorce under Nevada laws was proved in the same manner (R. 564-579).

Petitioner was advised by counsel upon his return to Massachusetts that the contempt proceedings were likely to continue over a protracted period of time (R. 257-258). Petitioner, therefore, had a corporation owned by him purchase a house in Worcester as an investment and he and his second wife resided in it while the present proceedings continued. The instant proceedings were begun in May, 1943, and had not as yet been concluded. Petitioner's counsel deemed it essential that petitioner stay in Massachusetts during this period.

The Trial Court in Massachusetts labeled most of the testimony of the petitioner false, disregarded completely the depositions of the Nevada counsel, and found that petitioner had never intended to change his Massachusetts domicile, despite his residence in New York and Nevada. The trial judge also found that the Nevada Court did not have jurisdiction of either party. He concluded that the divorce was invalid, and was in violation of G.L. (Ter. Ed.) c. 208, sec. 39, for the reason that the cause arose in Massachusetts, and that the parties were husband and wife in Massachusetts (R. 45-51). He thereupon overruled the plea in bar and dismissed the petition for revocation of the support order. The trial judge's conclusions with respect to the invalidity of the Nevada divorce proceedings and the violation of the statute were affirmed by the Supreme Judicial Court of Massachusetts.

Reasons for Granting the Writ.

1. The Court below has decided an important question of constitutional law which has not been heretofore determined by this Court. This case, unlike the first *Williams* case, 317 U.S. 287, the second *Williams* case, 325 U.S. 226, and the *Esenwein* case, 325 U.S. 279, presents a situation in which the divorce was granted with both parties filing pleadings on the merits, personally present before the Court, and testifying in the proceedings. See Radin, *The Authenticated Full Faith and Credit Clause*, 39 Ill. L. Rev. 1, 27. Furthermore, the State is not a party to this proceeding.

Even apart from the rule as to *res judicata* with respect to matters of jurisdiction, the Court below erred in holding that petitioner was domiciled in Massachusetts. The respondent, at her own expense, went from Worcester, Massachusetts, to Reno, Nevada, to contest the husband's divorce action. She was successful and obtained a divorce upon her own cross-complaint. She did not know that petitioner had sought a divorce until the citation was served upon her in Worcester. There was no communication between the spouses, until respondent arrived in Nevada, and then only through counsel for the purpose of a property settlement. Thus there is no foundation for a finding of prearrangement or collusion between the parties with respect to the Nevada divorce. The record is replete with evidence of petitioner's actual domicile in Nevada at the time he instituted the divorce proceedings. That his intention of making Nevada his home continued is evidenced by the uncontroverted fact that, after leaving Nevada temporarily when the divorce was granted, in order to settle his affairs in the East, he returned to that State with his second wife to purchase a home and a business there. He would not have left Nevada again but for the necessity of defend-

ing the contempt proceedings which were instituted by respondent in Massachusetts, soon after she had obtained her divorce.

An examination of the record in this case indicates that the trial judge was determined to hold the Nevada divorce invalid, no matter what the evidence indicated. Since that evidence did not support his findings, he chose the convenient device of "disbelieving" it. He magnified trivial inconsistencies in petitioner's testimony, readily explainable by reason of the fact that petitioner is quite deaf (R. 266-267). Among the findings of fact made is one to the effect that the Nevada Court did not have jurisdiction over the persons of the parties (R. 50). Such a finding is clearly an attempt to convert a constitutional claim into an unreviewable finding of fact in order to thwart review by this Court. *Williams v. North Carolina*, 325 U.S. 226, 236. The finding is without support in the record. The Trial Court made many similar findings in its effort to avoid review here. Most such findings were affirmed. The jurisdictional issue of domicile is open to review by this Court where a State tribunal has held invalid a judgment of divorce granted by a sister State. *Williams v. North Carolina*, 325 U.S. 226, 231, 7.

Moreover, in the instant case, the proper criteria and standards of proof for collaterally attacking a judgment based upon domicile have been completely disregarded by the Court below. It has ignored relevant evidence presented by petitioner and has persisted in the erroneous view stated earlier in *Bowditch v. Bowditch*, 314 Mass. 410, 415-416, that "one who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicile at the time the divorce relied upon was granted in the foreign State . . ." (see the first opinion below, R. 612). In the second *Williams* case, *supra*, at pages 233-234, this Court stated: "The burden of undermining the verity

which the Nevada decrees import rests heavily upon the assailant."¹ But the respondent in this case has been made to bear no such burden. On the contrary, it has been the petitioner herein who has been made to bear the burden of sustaining the Nevada decree, the effect of which has been ignored by the Court, apparently upon the theory that, since it is a Nevada divorce, it is *ipso facto* invalid. This, despite the fact that uncontroverted evidence of Nevada law demonstrates that the divorce is valid in that State (R. 564-579).

2. The decision below is contrary to the decisions of this Court in *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522; *Davis v. Davis*, 305 U.S. 32²; and *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371.

When the parties to a cause of action are personally subject to the jurisdiction of a Court of general jurisdiction and physically present before it, in the absence of an appeal the decision of such Court is final and conclusive, not only as to matters which were decided, but also as to all matters which might have been decided, including all questions of jurisdiction over the person and subject matter. *Cromwell v. County of Sac*, 94 U.S. 351. *Chicot County Drainage District v. Baxter State Bank*, *supra*. *Davis v. Davis*, *supra*. *Woodruff v. Heiser*, 327 U.S. 726. Cf. *Stoll v. Gottlieb*, 305 U.S. 165; *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430.

¹ In accord: *Esenwein v. Commonwealth, ex rel. Esenwein*, 325 U.S. 279; *Hermans v. Hermans*, 57 N.Y.S. (2d) 614; *Davis v. Davis*, 162 Pac. (2d) 62.

² The authority of the *Davis* case was questioned by the Massachusetts Supreme Court in *Sherrer v. Sherrer*, 1946 Adv. Sheets, 1193, at 1200, where a Florida divorce was denied faith and credit despite pleadings raising residence as a factual issue and the physical presence and participation of both parties before the Florida Court.

This principle was overlooked by the Court below when it stated that there had been no actual litigation with respect to the jurisdictional facts.³ Unlike the situation presented by the two *Williams* cases, the parties before the Court below were identical with those involved in the Nevada proceeding. The State is not a party here, and therefore *res judicata* with respect both to the merits and to questions of jurisdiction is applicable to the facts in this case.

The opinion below is in conflict with cases in other States and the District of Columbia upon this issue. In *Cole v. Cole*, 96 N.J. Eq. 206, upon very similar facts, the Court held that the judgment of the Nevada Court on the question of its jurisdiction was not subject to collateral attack. Accord: *Sleeper v. Sleeper*, 129 N.J. Eq. 94 (cross-complaint plus personal appearance); *Tiedeman v. Tiedeman*, 158 N.Y.S. 851, affirmed, 275 N.Y. 709 (demurrer filed to complaint for divorce); *Bloedorn v. Bloedorn*, 76 F. (2d) 812 (personal appearance and litigation on the merits).

In the above cases there was no actual litigation with respect to domicile in the Court granting the divorce, but both parties were personally subject to the jurisdiction of the Court and participated in the proceedings to varying degrees.

Andrews v. Andrews, 188 U.S. 14, even if not modified by the *Baldwin*, *Chicot County*, and *Davis* cases, *supra*, is not in conflict with the instant case, since there the wife expressly consented to the granting of the divorce and withdrew her appearance. Moreover, the parties in that case differed from those participating in the original divorce proceedings. Since *res judicata* is a bar only where the same parties or their privies are involved in the two ac-

³ Restatement, Conflicts, section 111, comment (a), states: "Domicil, like any other jurisdictional fact, is subject to collateral attack by a party who was not personally before the Court when the decree of divorce was granted." (Emphasis supplied.)

tions, that principle did not apply in the *Andrews* case, which dealt with a contest between the two wives. Restatement, Judgments, sec. 93.

3. This case presents a question of importance under the Full Faith and Credit Clause with respect to the property incidents of marriage which has not yet been decided by this Court. The Nevada judgment at the instance of respondent dealt with the question of support and the property rights of the parties. The decree of the Court approved and adopted a contract entered into by the parties settling those issues. The Court had personal jurisdiction over both parties and therefore had the power to enter a valid personal judgment. *Pennoyer v. Neff*, 95 U.S. 714. The distinction between the jurisdiction of a State to grant a divorce and to affect property rights was recognized in *Williams v. North Carolina*, 317 U.S. 287, 293, n. 4. See Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1, 28. Personal jurisdiction over both parties is needed for a Court to determine questions of support and property rights, but there is no reason why, in addition to personal jurisdiction, either of the parties must be domiciled in a State whose Court determines such matters. In *Esenwein v. Commonwealth, ex rel. Esenwein*, 325 U.S. 279, 281, Justice Douglas properly pointed out this basic difference, saying, at page 282:

"In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough v. Yarborough*, 290 U.S. 202; *Davis v. Davis*, 305 U.S. 32. But I am not

convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer v. Neff*, 95 U.S. 714. . . ."

The Court below completely ignored this question, although it was pressed by petitioner. Thus, in the instant case, the Nevada judgment, made with both parties before the Court, finally determining questions of support and property, is held void, thereby depriving petitioner of the benefits of the Nevada judgment, which finally disposed of such issues. Cf. *Yarborough v. Yarborough*, 296 U.S. 202.

4. The statute, G.L. (Ter. Ed.) c. 208, sec. 39, as applied in this case, deprives petitioner of rights guaranteed him by the Full Faith and Credit Clause. The first clause of this statute conforms to the requirements of the Full Faith and Credit Clause, but the second clause, particularly as applied in the present case, creates an unconstitutional exception to it. The statute, which is set forth above, provides that, if an inhabitant of the State goes into another jurisdiction to obtain a divorce for a cause occurring while he resided in Massachusetts, or for a cause not authorized under Massachusetts law, a divorce so obtained is void in Massachusetts. Thus, suppose H. separates from his wife, W., and moves to Nevada, where he makes his new home. W. is an "inhabitant" of Massachusetts. H. files a suit for divorce in Nevada, serving W. in Massachusetts. W. thereupon comes to Nevada, contests H.'s divorce, files a cross-complaint based on a cause occurring in Massachusetts, and, after the divorce is granted, returns to her home in Massachusetts. Under this statute, W.'s divorce is void in that State even though the Nevada Court had jurisdiction over the subject-matter by reason of H.'s domicile in

Nevada. The hypothetical case given above approximates the present facts. It is not unusual for a divorce to be granted upon the cross-complaint of a spouse not domiciled in the State. See *Cole v. Cole*, *supra*. Nevada statutes expressly permit such a procedure. Nevada Compiled Laws, 1929, sec. 9460, as amended (R. 573, 578). Requirements of the Full Faith and Credit Clause are met since at least one spouse is domiciled in the State granting the divorce and *in personam* jurisdiction exists over both. The statute, in effect, makes divorce for a cause occurring in Massachusetts a local action rather than one transitory in nature, completely disregarding the possibility that the spouses might acquire domicile in separate states. Having acquired separate domicils, as in this case, the foreign State may enter a judgment of divorce which Massachusetts must enforce.

In *Andrews v. Andrews*, 188 U.S. 14, the validity of this statute, as applied to the facts in that case, was sustained. But there the judgment of divorce without question was obtained by collusion of the parties. Even without the statute, the result there would have been the same. The wife in that case entered an appearance in the South Dakota Court. Thereafter, by written agreement, she expressly consented to the granting of a divorce to her husband in the following terms (188 U.S. at p. 17):

"Fourth. Upon the execution of such papers, M. F. Dickinson, Jr., is authorized in my name to consent to the granting of a divorce for desertion in the South Dakota court."

Her appearance was later withdrawn. The parties to that case differed from those before the Court granting the divorce. Thus the relationship between the parties in both cases necessary for the application of *res judicata* did not exist.

Admittedly, jurisdiction cannot be conferred by consent, nor may a spouse authorize the entry of a judgment for divorce against her as though it were an action upon a judgment note. *Andrews v. Andrews, supra*. But no such facts are presented in the instant case.⁴ Here the proceedings have been adversary throughout, both in Massachusetts and Nevada. The parties are the same. The respondent herself testified in the Massachusetts Court that there had been no communication between the spouses at any time prior to the granting of the divorce, except for purposes of the property settlement in Nevada. She travelled over 2000 miles to contest petitioner's divorce. Yet the Massachusetts statute is applied to the Nevada judgment in this case, in complete disregard of the fact that the judgment is final, both with respect to the merits and with respect to the question of the domicile of petitioner.

Conclusion.

This case presents highly important problems with respect to the application of the Full Faith and Credit Clause. An authoritative ruling from this Court is necessary. It is therefore urged that this petition for a writ of certiorari be granted, and that the judgment below be reversed.

Respectfully submitted,

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Of counsel:

GEORGE H. MASON,
SAMUEL PERMAN.

⁴ Nevada Compiled Laws, sec. 9461, as amended, provides (c. 169, sec. 1): "In all civil cases where the jurisdiction of the court depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence of such residence."